



**THE ATTORNEY GENERAL
OF TEXAS**

July 6, 1987

**JIM MATTOX
ATTORNEY GENERAL**

Ms. Colleen Jennings Batchelor
Senior Staff Attorney
Texas A & M University System
319 System Building
College Station, Texas 77843

Open Records Decision No. 466

Re: Whether letters concerning granting of tenure to a probationary faculty member that contain expressions of advice, opinion and recommendation, are exempt from disclosure under section 3(a)(11) of the Open Records Act

Dear Ms. Batchelor:

Texas A & M University received a request for a copy of a file that contains certain letters of recommendation about and evaluations of a probationary faculty member. The letters and evaluations concern whether the university should grant tenure to the faculty member. You assert that these documents are excepted from required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S., and enclose copies of the documents for review by this office pursuant to section 7 of the act. The documents in question may be divided into 5 different categories: (1) letters of recommendation from other universities about the faculty member, (2) evaluations from the faculty member's supervisors at A & M University, (3) a narrative summary and evaluation of the letters of recommendation and the evaluations, (4) "Tenure and Promotion Worksheets" consisting of identification of the evaluator, a check indicating approval or lack of approval for tenure, and handwritten comments, and (5) two tenure committee reports, containing brief evaluations and recommendations regarding tenure.

Under the Open Records Act, information must be released to the public unless the information falls within one of the act's specific exceptions to disclosure. You suggest that section 3(a)(11) protects these evaluations from disclosure. Section 3(a)(11) protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than one in litigation with the agency." Section 3(a)(11) protects information of the type that is privileged from discovery in litigation. Attorney General Opinion H-436 (1974). The exception was designed to protect advice and opinion on policy matters in order to encourage open and frank discussion in the deliberative process of governmental bodies. See Austin v. City of San Antonio, 630 S.W.2d 391, 394 (Tex. App. - San

Antonio 1982, writ ref'd n.r.e.); Attorney General Opinion H-436; Open Records Decision Nos. 464 (1987); 429 (1985); 209 (1978).

Several factors must be considered under section 3(a)(11). For example, section 3(a)(11) excepts only advice, opinion, and recommendation -- not facts or written observations of fact. See Open Records Decision No. 450 (1986). Advice, opinion, and recommendation may be withheld under section 3(a)(11) if release of the information would impair the government's ability to obtain the information in the future. Open Records Decision No. 464. Additionally, in Open Records Decision No. 429, this office indicated that such information, when submitted from outside sources, is protected by section 3(a)(11) only when it is prepared by a person or entity with an official reason or duty to provide the information in question. The ultimate test to which these factors are directed is whether the advice, opinion, or recommendation may play a role in the decision-making process. See Open Records Decision No. 464. Accordingly, the circumstances surrounding the creation or collection of specific information determine whether the information falls within section 3(a)(11).

The evaluations in categories 2-5, described above, clearly fall within section 3(a)(11). These categories include (2) evaluations from the faculty member's supervisors at A & M University, (3) a narrative summary and evaluation of the letters of recommendation and the evaluations, (4) "Tenure and Promotion Worksheets" consisting of identification of the evaluator, a check indicating approval or lack of approval for tenure, and handwritten comments, and (5) two tenure committee reports, containing brief evaluations and recommendations regarding tenure. All of these evaluations consist of advice, opinion, and recommendation. They were prepared by the faculty member's supervisors and the tenure review committee, persons with an official reason to provide the evaluations. These evaluations were prepared as a direct part of the decision-making process regarding the tenure of the individual in question. Consequently, they may be withheld under section 3(a)(11). See Open Records Decision No. 239 (1980) (college president's recommendations to the board of regents regarding faculty tenure are excepted from disclosure by section 3(a)(11)).

The first category of information described above, however, presents several different questions. This category consists of letters of recommendation from faculty at other universities. General letters of reference in a public employee's personnel file are not ordinarily protected by section 3(a)(11), even if the letters have been provided pursuant to an express promise of confidentiality. Open Records Decision Nos. 283, 273 (1981). This is true for two reasons. First, it is well-established that information is not confidential under the Open Records Act simply because the party submitting the information anticipates or requests that it be kept confidential. Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 668, 677 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). In other words, a governmental body cannot, through a contract,

override or repeal provisions of the Open Records Act. Attorney General Opinion JM-672 (1987); cf. Open Records Decision No. 284 (1981) (letters of recommendation submitted pursuant to express contracts of confidentiality prior to 1973, when the Open Records Act was enacted, are enforceable). Second, general unsolicited letters of recommendation are not ordinarily protected by section 3(a)(11) because the persons who draft the letters are not authorized to act, and do not in fact act, in an official capacity on behalf of the governmental body. See Open Records Decision Nos. 283, 273 (1981). This type of recommendation is not part of the decision-making process protected by section 3(a)(11).

The fact that information originates outside of a governmental body does not, however, always mean that the information cannot play a vital role in the deliberative process protected by section 3(a)(11). For example, section 3(a)(11) applies to advisory memoranda provided to a governmental body by an outside consultant with some duty to advise the governmental body or to act on its behalf in an official capacity. Attorney General Opinion JM-36 (1983); Open Records Decision No. 429 (1985). In Attorney General Opinion JM-36, this office indicated that, depending on the facts, student evaluations of faculty members could fall within section 3(a)(11) with students acting as "consultants." The opinion indicated, however, that at a minimum, the student's evaluation must be made in response "to a duty arising from a properly authorized request from the university administration." In Open Records Decision No. 429, this office stated that information protected by section 3(a)(11) must be prepared by a person or entity with an official reason or duty to provide the information. This requirement assures that the information plays a role in the deliberative process of the governmental body. See generally Wu v. National Endowment for Humanities, 460 F.2d 1030, 1032 (5th Cir. 1972), cert. denied, 410 U.S. 926 (1973). Otherwise, the purpose of section 3(a)(11) of protecting the free flow of information in the deliberative process would not apply. To say, however, that students have an official "duty" to evaluate faculty members is somewhat disingenuous. The reasoning in Attorney General Opinion JM-36 is simply an indirect way of assuring that information truly serves a role in the deliberative process and therefore deserves the protection of section 3(a)(11). As indicated in Open Records Decision No. 429, an official "reason" will suffice. In the context of "outside" recommendations and evaluations, this "test" may be met by assuring that (1) the governmental body has the authority to conduct the evaluation, (2) the governmental body initiated the evaluation or recommendation, and (3) the governmental body had a purpose for seeking the information from the source in question.

The outside letters of recommendation in question here meet all of the tests discussed. The letters consist of advice, opinion, and recommendation. The university expressly requested the submission of the letters as part of its tenure review process. The university had a purpose for requesting the letters from the persons contacted; those people worked with the tenure candidate being evaluated at other

universities and in national professional associations. They were particularly able to provide information about the candidate's national reputation in the profession. No one else could have provided the same information. The information played a role in the university's tenure evaluation process. Consequently, the letters may be withheld under section 3(a)(11).

Finally, it should be noted that some of the letters and memos in most of the five categories discussed above contain small amounts of factual data. For example, some of the evaluations recite the faculty member's degrees, professional affiliations, and prior experience. Section 3(a)(11) excepts only advice, opinion, and recommendation -- not facts or written observations of fact. See Open Records Decision No. 450 (1986). This information is probably available from other sources. If the requestor wants this factual data, however, and it can be severed and released without releasing advice, opinion, and recommendation, you must release the factual information. See Attorney General Opinion H-436 (1974). If the factual information is "inextricably intertwined," however, the whole document may be withheld. Open Records Decision Nos. 239 (1980); 174 (1977). The copies of documents you submitted to this office have been marked to show what factual information must be released.

S U M M A R Y

Under section 3(a)(11) of the Texas Open Records Act, article 6252-17a, V.T.C.S., the following information may be withheld from required public disclosure: (1) letters of recommendation submitted by faculty at other universities about a probationary faculty member at Texas A & M University, (2) evaluations from the faculty member's supervisors at Texas A & M University, (3) a narrative summary and evaluation of the letters of recommendation and the evaluations, (4) "Tenure and Promotion Worksheets" consisting of identification of the evaluator, a check indicating approval or lack of approval for tenure, and handwritten comments, and (5) two tenure committee reports, containing brief evaluations and recommendations regarding tenure. Severable factual information must, however, be released.

Very truly yours,

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